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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1999

DION ERIC SAVAGE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ of Certiorari To
The United States Court of Appeals
For the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

LAW OFFICES OF ALVIN L. KEEL, P.C.
By: ALVIN L. KEEL*
Attorneys for Petitioner
561 East Jefferson
Detroit, Michigan 48226
(313) 965-4292

* Counsel of Record

48pp

QUESTION PRESENTED FOR REVIEW

DID THE TRIAL COURT VIOLATE PETITIONER'S SIXTH AMENDMENT CONSTITUTIONAL GUARANTEE TO A UNANIMOUS VERDICT BY AN IMPARTIAL JURY WHERE IT EXCUSED A DELIBERATING JUROR AND PERMITTED THE REMAINING ELEVEN JURORS TO DELIBERATE TO A VERDICT, *AFTER* THE JUROR ADVISED THE COURT THAT SHE WAS A SOLE "HOLDOUT" JUROR AND *AFTER* THE JURY HAD APPRISED THE COURT THAT THEY WERE UNABLE TO REACH UNANIMOUS AGREEMENT?

Petitioner answers, *"Yes."*

Respondent presumably will answer, *"No."*

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BASIS FOR JURISDICTION IN THIS COURT

This Petition for a *Writ of Certiorari* seeks review of the September 21, 1999, judgment entered by the United States Court of Appeals for the Sixth Circuit in this action. ***See*** **Appendix.** *See* U.S. Supreme Court Rule 14.1(e)(i).

Petitioner states that 28 U.S.C. § 1254(1) confers jurisdiction in this Court to review on *Writ of Certiorari* the above-identified judgment of the United States Court of Appeals for the Sixth Circuit. *See* Supreme Court Rule 14.1(e)(iv).

Pursuant to Supreme Court Rule 14.1(f), the pertinent constitutional provision(s), statute(s), and rule(s) involved in this Petition, set forth *verbatim*, in part, are:

Article III, Section 1, U.S. Const.:

"Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . ."

Article III, Section 2, U.S. Const.:

"Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, . . . [and] to Controversies to which the United States shall be a Party; . . .

In All the other Cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Article VI, U.S. Const.:

"This Constitution, and the Laws of the United States which

shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . ."

Amendment VI, U.S. Const.:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Federal Rule of Criminal Procedure 23(b):

"Juries shall be of 12 but ... a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. . . . [I]f the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors."

Federal Rule of Criminal Procedure 31(a):

"The verdict shall be unanimous."

Since this Petition for a *Writ of Certiorari* seeks review of a judgment of the United States Court of Appeals for the Sixth Circuit, Petitioner states that the following constitute the basis for federal jurisdiction in the court of first instance: 18 U.S.C. § 922(g); 21 U.S.C. § 841(a)(1); 21 U.S.C. § 846; *and* 21 U.S.C. § 848. *See* Supreme Court Rule 14.1(g)(ii).

STATEMENT OF THE CASE

Petitioner, Dion Eric Savage ("Petitioner"), was indicted for several violations of federal criminal law: Count I, a continuing criminal enterprise, 21 U.S.C. Sec. 848; Count II, conspiracy to distribute cocaine, 21 U.S.C. Sec. 841(a) and Sec. 846; and Count VI, felon in possession of a firearm, 18 U.S.C. Sec. 922(g). Petitioner was charged along with other named individuals Claude Sean Carter, William Martin Monroe, Martez Roson Coleman, Mark Anderson, and Eric Simpson.

Petitioner was tried before a Jury along with co-defendants Anderson and Simpson. Trial commenced on June 9, 1997, before United States District Judge Paul V. Gadola, of the Eastern District of Michigan, Southern Division, at Flint (No. 95-50061-CR).

Petitioner was convicted on several counts, as follows: Count One- continuing criminal enterprise ("CCE"), 21 U.S.C. § 848; Count Two- conspiracy to distribute cocaine, 21 U.S.C. §§ 841(a)(1) and 846; *and* Count Six- felon in possession of a firearm, 18 U.S.C. § 922(g). The district court sentenced him to a ***mandatory life prison term*** for the CCE conviction.

Petitioner appealed his convictions. His paramount claim of error involved the trial court's dismissal of a deliberating "holdout" juror. That dismissal deprived Petitioner of a fundamental constitutional guarantee to *all* accused persons brought to the bar of justice under federal criminal law: *the Sixth Amendment right to a unani-*

mous verdict by an impartial jury.

Despite several relevant, well-reasoned rulings from other federal circuit courts of appeal directly on point- application of any one of which should have impelled the Sixth Circuit to sustain his appeal- Petitioner's plea was rejected. Unfortunately, that court seems to have failed to fully appreciate the constitutional implications of the district court's error.

By sanctioning the trial court's refusal to declare a mistrial under the circumstances, the court of appeals has allowed a grave constitutional error to remain uncorrected. Petitioner brings this *Writ of Certiorari* in the hope that this Honorable Court will now act to correct the Sixth Circuit's failure to rectify the district court's deprivation of Petitioner's Sixth Amendment rights in this case.

Jury selection in Petitioner's case began on June 9, 1997. Trial proofs concluded on June 26, 1997; the jury retired to deliberate on June 27, 1997.

On July 7, 1997, the jury announced that it had convicted Petitioner of all counts. On October 21, 1997, Judge Gadola sentenced Petitioner to concurrent terms of imprisonment as follows: ***mandatory life imprisonment*** on Count One (CCE); no sentence (held in abeyance) on Count Two (conspiracy to distribute cocaine); *and* ten (10) years' imprisonment on Count Six (felon in possession of a firearm).

Petitioner timely appealed his convictions. The panel judgment of the Sixth Circuit Court of Appeals Court denying Petitioner's

appeal was entered on September 21, 1999. ***See* Appendix.**

The juror dismissal saga unfolded as follows. On June 30, 1997, Juror Helen Turner sent a note to Judge Gadola in which she asked to be relieved of her duties as a juror. The court spoke with Turner in chambers. Turner advised Judge Gadola that she was diabetic, and that the deliberations were causing her a great deal of stress. She said she feared undergoing a nervous breakdown as a result of the pressures she was encountering in deliberations. (Trial Transcript, Vol. XV, p. 5.)

In chambers, Juror Turner told Judge Gadola that she was under tremendous pressure from other jurors, and that they did not respect her opinions. After asking Turner to step outside of the courtroom- while allowing her to momentarily remain separated from the other jurors- Judge Gadola then advised counsel that Turner had told him that:

> She ... wants to be excused from this jury. *That she feels that she cannot continue on this jury.* That she is under a great deal of stress. That she is highly stressed, that she is diabetic, she's afraid she's going to have some sort of health problem *if she continues under this stress in the jury room.* In fact, she said I don't want to have a nervous breakdown over this. ***She said, further, that her fellow jurors, she felt, were not listening to her views, that they were not willing to hear her views.*** That none of her fellow jurors have lived in the inner city and know what life in the inner city is like. *She also said that while government witnesses had testified that the size of a rock of cocaine possessed by a defendant in this case indicates that it was possession with intent to distribute the same, rather than for personal use, that she [Juror Turner] has had some contact with people from Odyssey House, which is a drug rehabilitation facility located in the*

*community, **and that she believes that addicts do sometimes possess that large a rock of crack cocaine for personal use, contrary to what she says her fellow jurors seem to feel.*** (T, Vol. XV, pp. 5-6)(emphasis supplied).

Judge Gadola advised counsel that he told Turner that expressing different views, discussing them with other jurors, and respectfully listening and considering such views were all properly a part of a jury's deliberation process. The court said he had "emphasized to her the importance of deliberations continuing in an effort to reach agreement in this case, and thereby avoid a mistrial." (T, Vol. XV, p. 6).

Judge Gadola then summoned Ms. Turner back into the courtroom, with counsel present. He acknowledged her statements to him regarding the other jurors' refusal to listen to her views, and advised her once again that disagreement was inherent in deliberations. (T, Vol. XV, pp. 12-13). The court then recessed the jurors for the day, ordering them to return and resume deliberations the following morning.

Despite the judge's admonishing her that she reveal nothing of the deliberations, however, Turner nonetheless told the court:

JUROR TURNER: But I'd also like to say, I don't think nothing is going to —

* * *

JUROR TURNER: Well, okay. ***Well, I just feel we are too far apart.*** . . . *And we are not*

going to be in agreement. . . .
They <u>have already indicated to me, it's one way and that's it</u>.

(T, Vol. XV, pp. 14-15)(emphasis added).

Subsequently, early in the morning of July 2, 1997, jurors informed Judge Gadola that they were deadlocked. Specifically, the jury advised that it could not reach a unanimous verdict on Counts One and Two. (T, Vol. XVII, p. 2; p. 6). Without objection, Judge Gadola then read the deadlock instruction to the jurors. (T, Vol. XVII, pp. 6-9).

The next day, Thursday, July 3, 1997, Juror Turner asked to go to her doctor for treatment regarding her medical condition. She again complained about stress brought on by the pressures she was enduring in deliberations. The following exchange ensued:

JUROR TURNER:	It's too much stress. My head feels like it's going to bust. I'm having pains in my chest, and I'm going straight to my doctor.
THE COURT:	You're going straight to the doctor —
JUROR TURNER:	***And if the only way I can get out of there, <u>I've got to go along with what everybody says</u>*** –
THE COURT:	Wait a minute, Ms. Turner, I told you I don't want to hear—

(T, Vol. XVIII, p. 4)(emphasis added). The court allowed Turner to leave

to visit her doctor (T, Vol. XVIII, pp. 5-8). He then recessed the remaining jurors for the Fourth of July holiday, directing them to reconvene to resume deliberating the following Monday morning.

That day, Monday, July 7, 1997, Turner's physician testified about her health. (T, Vol. XVIII, pp. 3-15). After listening to Turner's doctor and argument from counsel, Judge Gadola excused Juror Turner from Petitioner's jury panel. (T, July 7, 1997, Vol. XVIII, pp. 45-49).

Upon the excusing of Juror Turner, Petitioner's trial counsel promptly moved the court to declare a mistrial. (T, Vol. XVIII, pp. 32-33). The court declined. Instead, the court opted to proceed with the eleven (11) remaining jurors. (T, Vol. XVIII, pp. 49-64). At that point, the court informed the remaining jurors merely that Turner had been excused at her own request for poor health. (T, Vol. XVIII, pp. 65-67).

REASONS FOR GRANTING THE WRIT

Petitioner's convictions were obtained through a process which deprived him of his Sixth Amendment rights. As a result of that process, Petitioner has been imprisoned for life. This Petition for a *Writ of Certiorari* is the ***final*** resort Petitioner has to convince the Judiciary to vindicate his Sixth Amendment constitutional guarantees and ensure that justice is ultimately achieved in his case.

Moreover, the judgment of the Sixth Circuit Court of Appeals in this case, ***see*** **Appendix, pp. 5-9,** irreconcilably conflicts with rulings of other federal appellate courts which

have decided substantially the same important matter. *See* U.S.Sup.Ct. Rule 10(a). This Honorable Court should therefore GRANT the requested *Writ of Certiorari* in this case to achieve the following important objectives:

1. Remedying the error to achieve the fair and just result for Petitioner; *and*
2. Promoting uniformity of result and overall fairness in the conduct of trials implicating federal criminal laws within the Sixth Circuit Court of Appeals, and thereby harmonizing the law of the Sixth Circuit with that of other Circuit Courts of Appeal which have decided the jury unanimity question implicated here.

Apparently, the trial court failed to appreciate how its relieving an ill juror of her duties placed Petitioner's Sixth Amendment right to a unanimous, impartial jury in very serious jeopardy. In order to adequately safeguard that right upon its dismissal of Juror Turner under the circumstances in this case, the trial court was *required* to declare a mistrial. Opting instead to permit the remaining 11 jurors to continue deliberating- despite the court's knowledge of Turner's skepticism about the government's proofs, despite its knowledge that she was resisting pressure to conform from her fellow jurors, despite ample evidence that Turner was a sole "holdout" juror favoring the defense, and despite its knowledge that the jury had deadlocked *prior* to its dismissal of Turner- was erroneous. Al-

though it may have justifiably believed itself compelled to dismiss Juror Turner based on her frail health, once it did so the court effectively had no choice but to also declare a mistrial.

When a court learns that a juror is a holdout for a defendant- and maybe the *sole holdout*- it is legal error to dismiss or excuse that juror without declaring a mistrial. Dismissing or excusing a juror in order to break a deadlock or avoid the prospect of a "hung" jury is improper. Well-reasoned decisions of several federal circuit courts of appeal confronted with similar situations explain why a mistrial is required in such cases.

By its express wording, the Sixth Amendment to the United States Constitution guarantees to every accused the right to be tried "by an impartial jury." In *United States v. Essex,* 734 F.2d 832 (D.C.Cir.1984), the court observed that in *Apodaca v. Oregon,* 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 194 (1972), and *Johnson v. Louisiana,* 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972), five Justices of this Court agreed that, in federal criminal cases, the Sixth Amendment ***requires*** juries to render a *unanimous* verdict as well. 734 F.2d at 841. The D.C. Circuit Court of Appeals "has reiterated [these] Justices' constitutional interpretation." *See United States v. Brown,* 823 F.2d 591, 595 (D.C.Cir.1987)(citing *Essex, supra,* 734 F.2d at 840-841).

"The right to a unanimous jury is derived from the federal rules and the Sixth Amendment." *Essex,* 734 F.2d at 841 (citations

omitted). The Federal Rules of Criminal Procedure "echo the constitutional requirement of unanimity: Rule 31(a) states simply that '[t]he verdict shall be unanimous.'" *Brown*, 823 F.2d at 595; *see Essex*, 734 F.2d at 840 (also quoting Fed.R.Crim.P. 31(a)).

Under Rule 23(b) of the Federal Rules of Criminal Procedure, a trial court has discretion to permit an 11-member jury to deliberate to a verdict if a juror becomes unavailable after deliberations have commenced. (It is the discretionary authority vested with him by this rule upon which Judge Gadola's dismissal of Juror Turner is premised. Fed.R.Crim.P. 23(b)). However, "[e]xcusing a juror during deliberations jeopardizes the right to unanimity protected by Rule 31(a). This Rule was designed to protect the rights of defendants under the Sixth Amendment to the United States Constitution. See Fed.R.Crim.P. 23, Notes of Advisory Committee, subd. (a)." *Essex*, 734 F.2d at 840.

"That a juror may not be removed because he or she disagrees with the other jurors as to the merits of a case requires no citation." *United States v. Hernandez*, 862 F.2d 17, 23 (2nd Cir.1988). "Moreover, **removal of the sole holdout for acquittal** ***is an issue at the heart of the trial process and must be meticulously scrutinized***." *Id.* (Emphasis added.)

In *Hernandez*, the Second Circuit could not "be confident that Juror No. Four's disagreement with his colleagues was not the cause of his removal." The trial court had ordered Juror Four to

remain on the jury after a fight had erupted in the jury room. It had also kept this juror in service even after learning that he had been discharged from the armed forces "for psychiatric reasons," although the court believed him unfit to serve on the jury. "Nevertheless," explained the court of appeals, "[the trial court] *decided to wait and see whether the jury could reach a unanimous verdict.* ***Only when the jury deadlocked two days later did the court remove him.***" *Id.* (Emphasis added.) In the court's view, the record ***"seem[ed] to reflect that the cause of the removal was as much to avoid a mistrial because of a hung jury*** as to excuse an incompetent juror." *Id.* (Emphasis added.) The court therefore reversed the defendant's conviction and remanded. *Id.* at 23-24.

This reasoning is highly instructive. In a situation remarkably similar to the one presented in *Hernandez,* here Judge Gadola had been apprised several times about Juror Turner's precarious health and the serious distress she was tolerating during deliberations. More importantly, Turner had specifically told Judge Gadola she could *not* agree with the others, that ***all of them disagreed*** *with her*, that ***"we are not going to be in agreement,"*** *and* that the other jurors had told her in no uncertain terms that ***"it's one way and that's it."*** (T, Vol. XV, pp. 14-15). A subsequent entreaty from Juror Turner included her plea to the court, "*if the only way I can get out of there,* ***I've got to go along with what everybody says.***" (T, Vol. XVIII, p. 4).

Only later, however, ***after*** the jury advised Judge Gadola

that it was deadlocked- ***which was also well <u>after</u> he had been made aware that Turner was a holdout juror-*** did the court inquire into the seriousness of Turner's health problems and dismiss her from Petitioner's jury on her doctor's advice. Removing Juror Turner *<u>after</u>* she told the court she disagreed with the remaining jurors about the merits of the government's case- *i.e.,* to effectively break the jurors' deadlock- was error. *Hernandez,* 862 F.2d at 23. *See United States v. Thomas,* 116 F.3d 606, 624 (2nd Cir.1997)("as the law of our Circuit makes clear, a district court *may under no circumstances* remove a juror in an effort to break a deadlock")(emphasis supplied).

Other circuits employ legal principles similar to those articulated by the Second Circuit in *Hernandez* and *Thomas, supra.* In *United States v. Brown, supra,* the D.C. Circuit squarely held that a court may *<u>not</u>* dismiss a juror during deliberations if the request for discharge stems from doubts the juror harbors about the sufficiency of the government's evidence. Such a removal would directly violate a defendant's constitutional right to a unanimous verdict, "because the dismissal allows the prosecutor to gain a conviction *even though he has failed to persuade all of the jurors that the defendant violated the law."* 823 F.2d at 596 (emphasis added). The *Brown* court declared: "[w]e must hold that *if the record discloses <u>any possibility</u> that the request to discharge stems from the sufficiency of the government's evidence, the court <u>must</u> <u>deny</u> the request."* *Id.* (Emphasis added.) "Any other holding would fail to adequately protect

a defendant's right to be convicted only by a unanimous jury." *Id.*

In *United States v. Essex, supra*, the D.C. Circuit found a violation of the constitutional "right to a unanimous verdict because there was a 'possibilit[y]' that the absent juror was 'a lone holdout for innocence in the face of a hostile pro-conviction majority' and ... the prosecution had not carried its 'burden of convincing the entire membership of the jury.'" 734 F.2d at 843-844, quoted in *Brown, supra,* at 596.

Under *Brown,* where the record does, in fact, disclose *"any possibility"* that the juror's request to be discharged stems from doubts about the sufficiency of the government's evidence, 823 F.2d at 597, the court simply may not discharge the juror. Instead, to safeguard the defendant's Sixth Amendment right to a unanimous verdict by an impartial jury, "'the judge ***must either declare a mistrial or*** *send the jury back to deliberations* with instructions that the jury attempt to reach agreement.'" *United States v. Dorsey,* 865 F.2d 1275, 1279 (D.C.Cir.1989), quoting *Brown, supra* at 596 (emphasis added). ***These are the judge's only options in such a situation.***

Approving the principles underlying these holdings is *United States v. Barone,* 114 F.3d 1284 (1st Cir.1997). In *Barone,* the court noted that the amendment to Rule 23(b) "was intended to provide a preferred mechanism for avoiding a mistrial where a juror is excused after deliberations have begun, [citation omitted], particularly "where the trial has been a lengthy one and consequently the remedy of

mistrial would necessitate a second expenditure of substantial prosecution, defense and court resources, Fed.R.Crim.P. 23(b) Advisory Committee's Note." 114 F.3d at 1308. However, *Barone* specifically approved of the admonishment in *Brown, supra*, that "'Rule 23(b) is not available *when the record **discloses a possibility*** that the juror believes that the government has failed to present sufficient evidence to support a conviction.'" *Id.*, quoting *Brown*, 823 F.2d at 597 (emphasis supplied).

Distinguishing *Brown* from the case before it, the *Barone* court found in the record "no true evidence regarding [the juror's] views on the merits of the case." "Thus," concluded the court, "in contrast to the juror in *Brown* (who indicated to the judge that he was unable to discharge his duties because he disagreed with the RICO laws and was troubled by presentation of the evidence), Berger was excused for a valid reason that was *entirely unrelated to the issue of how he felt about the sufficiency of the government's proof*; ..." 114 F.3d at 1309 (emphasis supplied). It reasoned:

> "We think that, where, as here, *a juror is removed for **a just cause that is unrelated to the juror's views about the sufficiency of the evidence, and there is no indication that the removed juror was a holdout juror,** Brown's* admonition that 'a court may not dismiss a juror during deliberations if the request stems from doubts the juror harbors about the sufficiency of the government's evidence,' 823 F.2d at 596, does not apply." *Id.* (Emphasis supplied.)

Barone concluded "that the district court did not abuse its discretion permitting the eleven-member jury to deliberate to a verdict, rather

than declaring a mistrial." *Id.*

Recently, the Ninth Circuit announced a similar test. In *United States v. Symington,* 1999 U.S. App. LEXIS 13674)(9th Cir., 6-22-99), the court stated: "[w]e hold that if the record discloses ***any reasonable possibility*** that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must ***not*** dismiss the juror. Under such circumstances, ***the trial judge has only two options: send the jury back to continue deliberating or declare a mistrial.*** See *Brown,* 823 F.2d at 596. This rule is attentive to the twin imperatives of preserving jury secrecy and safeguarding the defendant's right to a unanimous verdict from an impartial jury." *Id.* (Emphasis supplied.)

Applying the test adopted by the Ninth Circuit in *Symington* to the facts of the instant case, it becomes plain that the trial court's dismissal of Juror Turner clearly can not pass constitutional muster. That is true because a good deal of record evidence more than amply disclosed a "reasonable possibility" that the impetus for the court's excusing Juror Turner here "stem[med] from [her] views on the merits of the case." *Symington, supra.* Judge Gadola possessed ample evidence- from Turner herself- that she was, indeed, a sole "hold-out" juror who refused to relent to pressure from her fellow jurors and agree that the government had sufficiently proved Petitioner's guilt. When the jury later told him that it was, in fact, deadlocked, the trial court finally saw fit to inquire about Turner's health

with her doctor. ***Only then did the court proceed to excuse her.***

Here, ample record evidence discloses a *probability* that Juror Helen Turner was "a lone holdout for innocence in the face of a hostile pro-conviction majority." *Cf. Essex,* 734 F.2d at 844. Necessarily, then, the prosecution had plainly not "carried its burden of convincing the entire membership of the jury," *Brown,* 823 F.2d at 596 (citing *Essex, supra*). Under the circumstances of this case, excusing Turner from Petitioner's jury pursuant to Rule 23(b) clearly resulted in the violation of the Petitioner's Sixth Amendment right to a unanimous verdict by twelve impartial jurors.

Juror Turner *told the trial court* she was the *sole holdout for acquittal* on the jury panel. Faced with this reality, Judge Gadola- if justifiably compelled to dismiss Juror Turner for cause due to poor health- was *required* to declare a mistrial. *Hernandez, supra; Brown, supra; see Dorsey,* 865 F.2d at 1279 ("'the judge ***must either declare a mistrial or*** *send the jury back to deliberations* with instructions that the jury attempt to reach agreement'"*)*; *Thomas,* 116 F.3d at 624 ("a district court may *under no circumstances* remove a juror in an effort to break a deadlock"); *Barone,* 114 F.3d at 1308 ("'Rule 23(b) is not available when the record discloses a possibility that the juror believes that the government has failed to present sufficient evidence to support a conviction'")(emphasis supplied).

Petitioner's critically important Sixth Amendment guarantee to jury unanimity was taken away in this case. "It is undisputed

that Symington, as a federal criminal defendant, has a constitutional right to a unanimous verdict. See *United States v. Ullah,* 976 F.2d 509, 513 n. 13 (9th Cir.1992)." *Symington, supra,* n. 2. Dismissing ill Juror Helen Turner was fine as far as it went; however, since the court knew or reasonably should have known that her holdout views were *the* cause of the jury's admitted inability to unanimously agree in their deliberations on Petitioner's fate, it had no choice but to also declare a mistrial.

In an effort to protect a juror's health and avoid a hung jury, the trial court here sacrificed the Petitioner's Sixth Amendment right to a unanimous verdict by an impartial jury. Under these circumstances, Petitioner's "right to a unanimous verdict [was] illusory." *Symington, supra* (quoting *Brown,* 823 F.2d at 596). This grave constitutional error requires reversal and remand for a new trial for Petitioner.

RELIEF

Because the judgment of the Sixth Circuit failed to vindicate Petitioner's Sixth Amendment right to a unanimous verdict by an impartial jury here, that judgment must be vacated. Petitioner's convictions must be reversed and his sentences vacated as well. *Symington, supra.*

Petitioner submits that the constitutional error complained of here- and the direct conflict between the judgment of the Sixth Circuit panel in this appeal and relevant law prevailing in other Circuit Courts of Appeal on the same important matter- warrant GRANTING of the *Writ of Certiorari* sought herein. U.S. Sup.Ct. Rule 10(a).

Respectfully submitted,
LAW OFFICES OF
ALVIN L. KEEL, P.C.

By: ALVIN L. KEEL*
Attorneys for Petitioner
561 East Jefferson
Detroit, Michigan 48226
(313) 965-4292

* Counsel of Record

Dated: December 20, 1999

NOT RECOMENDED FOR PUBLICATION

Nos. 97-2305/2307/2316, 98-1050

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	FILED SEP 21 1999
	)	LEONARD GREEN
Plaintiff-Appellee,	)	Clerk
	)	
v.	)	ON APPEAL FROM
	)	THE
	)	UNITED STATES
	)	DISTRICT
ERIC LYZELL SIMPSON, MARK	)	COURT FOR THE
ANDERSON, DION ERIC SAVAGE,	)	EASTERN
and MARTEZ RASON COLEMAN,	)	DISTRICT OF
	)	MICHIGAN
Defendants-Appellants.	)	

Before: MERRITT, NELSON and SLIER, Circuit Judges.

SILER, Circuit Judge. This is a consolidated direct criminal appeal of four individuals convicted of conspiring to distribute crack cocaine and other related offenses. All defendants appeal their convictions. In addition, defendants Eric Lyzell Simpson and Martez Rason Coleman appeal their sentences. Numerous issues have been raised. We affirm, with the exception that Savage's conspiracy conviction will be set aside because we uphold his continuing criminal

enterprise conviction.

I. BACKGROUND

A. CONVICTIONS AND SENTENCING

After trial, defendants Simpson, Mark Anderson, and Dion Eric Savage were convicted on: Count One- continuing criminal enterprise ("CCE"), 21 U.S.C. § 848 (Savage); Count Two- conspiracy to distribute cocaine, 21 U.S.C. §§ 841(a)(1) and 846 (Simpson, Anderson, Savage); Count Four- possession with intent to distribute cocaine, 21 U.S.C. § 841(a)(2)(Simpson); Count Five- felon in possession of a firearm, 18 U.S.C. § 922(g)(Simpson); Count Six- felon in possession of a firearm (Savage); Count Ten- possession with intent to distribute cocaine (Anderson). In a later trial, Coleman was convicted on two counts: Count Two, conspiracy to distribute cocaine, and Count Nine, possession with intent to distribute cocaine.

Savage was sentenced to concurrent terms of life on Count One, CCE, and ten years on Count Six, felon in possession of a firearm. He was not sentenced on the conspiracy count, a lesser included offense of CCE. Simpson received concurrent sentences of 360 months for Count Two, conspiracy; 240 months for Count Four, possession with intent to distribute; and 120 months for Count Five,

felon in possession of a firearm. Anderson was sentenced to concurrent sentences of 360 months on Counts Two and Ten, conspiracy and possession with intent to distribute. Coleman received two concurrent sentences: 324 months on Count Two, conspiracy; and 240 months on Count Nine, possession with intent to distribute.

II. DISCUSSION

A. JURY ISSUES

Simpson, Anderson and Savage assert the district court erred by excusing two jurors. Simpson and Savage also assert the court erred by accepting a verdict from a jury of eleven persons.

1. Dismissal of Juror Bacon

Juror Louis Bacon was dismissed by the court before deliberations and replaced by an alternate juror. Under Federal Rule of Criminal Procedure 24(c), "[a]lternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, be come or are found to be unable or disqualified to perform their duties." *See, e.g., United States v. Ramos,* 861 F.2d 461, 466 (6th Cir. 1988)(analyzing for abuse of discretion the dismissal of a juror under Fed.R.Crim.P. 23(b) after deliberations had begun).

Juror Bacon did not respond to any of the voir dire questions relating to past arrests or convictions although he had been arrested and convicted of at least two misdemeanors in the early 1950s. He justified his failure to disclose his criminal history by stating that a person at the county courthouse had at one time told him that any matter more than 10 years old was irrelevant. He was also observed by the court to be indicating strong feelings about the case by his demeanor in the jury box. In addition, two jurors revealed that Juror Bacon had been making other jurors uncomfortable by commenting on the trial while in the jury box.

The district court found "ample and abundant cause" to dismiss Juror Bacon, citing his "[f]ailure to disclose the criminal history, the comments made to other jurors which disturbed at least two other jurors, skepticism regarding certain police testimony in this case, [and] the attitude that I've noted." The court also mentioned that the prosecution had not used all of its peremptory challenges and would likely have exercised a peremptory challenge had it known of Juror Bacon's criminal history.

The district court did not abuse its discretion in dismissing Juror Bacon.

2. Dismissal of Juror Turner

Juror Helen Turner was dismissed during deliberations and was thus not replaced by an alternate juror. Under Federal Rule of Criminal Procedure 23(b), "if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the 11 remaining jurors."

The jury began its deliberations on Friday, June 27, 1997. On Monday, June 30, 1997, Juror Turner sent a note to the district court saying that she needed to speak to the judge. She told the court that she wished to be excused from the jury because she was stressed and diabetic and would havea health problem and nervous breakdown if required to continue. In addition, she related that she, unlike other jurors, had lived in the inner city, and had heard from persons at a drug rehabilitation facility that large rocks of crack can be for personal use. The court told her not to disclose the state of the proceedings and emphasized to her that all jurors should deliberate and attempt to agree on a verdict, but that they should only do so in good conscience. Because Juror Turner had expressed skepticism as to the proof of possession with intent to distribute counts, the court decided to leave her on the jury. The court then called Juror Turner

into the courtroom and made a record of her conversation with the court. Although she was asked not to speak of the deliberations in the jury room, she told the court, "I just feel we are too far apart."

The next day the parties argued the government's motion to dismiss Juror Turner. The motion emphasized her untruthful responses during voir dire (regarding the criminal history of members of her immediate family) and her willingness to use as evidence outside information she had from a drug rehab center. The court noted that it would likely have dismissed her if the information had come to its attention prior to deliberations, but denied the dismissal motion because it was concerned about dismissal in light of Juror Turner's remarks about the panel division and amounts of crack cocaine for personal use.

On Wednesday, July 2, 1997, the jury sent out a note saying that it could not reach unanimous verdicts on Counts One and Two (CCE and conspiracy). The court then instructed on deadlocked juries and partial verdicts. Later, after a request from the jury, the court repeated the jury instructions for conspiracy and possession with intent to distribute cocaine. On Thursday, July 3, 1997, Juror Turner sent out a note saying that she was ill, and told the court she was having pains in her chest, her head was going to

"bust," and that she needed to see her doctor. The court released her for an examination. On July 7, 1997, Juror Turner's doctor testified that Turner's diabetes was difficult to control, that she had some degree of heart disease, that she had a heart attack at some time, and that she had high blood pressure. Her blood pressure on July 3 had been 208/96. The doctor was of the opinion that she was unable to continue as a juror. However, he did agree after questioning by the court that he could monitor her condition daily, but only after an urgent psychiatric consultation. The court then dismissed Juror Turner for health reasons.

Ill health may constitute the "just cause" required for dismissal under Rule 23(b). *See, e.g., United States v. Glover,* 21 F.3d 133, 135 (6th Cir. 1994) (affirming the decision to proceed with eleven jurors after the dismissal of the twelfth juror for health reasons). The court demonstrated concern that the dismissal might appear to be for reasons related to her views of the evidence and was careful to specify that Turner's dismissal was for health reasons only. The court dismissed Turner not because she might have had doubts about some aspects of the government's proof, but in spite of the possibility that she had doubts.

In light of the testimony from Turner's physician that it was

his medical opinion that she should not continue on the jury, the dismissal of Juror Turner was not an abuse of the district court's discretion.

3. Verdict from Eleven Jurors

The district court allowed the jury to continue in its deliberations with only eleven members after Turner was excused rather than declaring a mistrial. Under Rule 23(b), it is within the sound discretion of the trial court whether to continue with eleven members of the jury when a juror has been dismissed after deliberations have begun. *See Glover*, 21 F.3d at 135; *Ramos*, 861 F.2d at 466.

Defendants argue that because Turner was potentially a holdout juror, it was improper to continue deliberations with eleven jurors. Because the district court did not commit error in dismissing Turner for health reasons, however, it did not err on that ground when it allowed continued deliberations with eleven jurors. Another argument against continuing deliberations in this case is that allowing deliberations with eleven jurors is an "unusual step" not warranted on the facts of this case. *See Glover*, 21 F.3d at 136. However, this case lasted three weeks and involved hundreds of exhibits and numerous witnesses and therefore entailed a substantial expenditure of judicial resources; the trial court was within its sound discretion when it

permitted deliberations to continue. *See id.*

B. SUFFICIENCY OF THE EVIDENCE ON CONSPIRACY AND POSSESSION WITH INTENT TO DISTRIBUTE COCAINE

All defendants claim that the proof on the charge of possession with intent to distribute cocaine was constitutionally insufficient to support a guilty verdict. Similarly, all defendants except Coleman attack their conspiracy convictions for the same reason.The relevant inquiry on review of the sufficiency of the evidence is not *de novo*, but is rather "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 313 (1970). Included in that assessment may be circumstantial evidence and the uncorroborated testimony of an accomplice. *See United States v. Davis,* 809 F.2d 1194, 1203 (6th Cir. 1987).

Conviction for possession with intent to distribute cocaine requires proof that the defendant knowingly or intentionally possessed the cocaine with intent to distribute. *See* 21 U.S.C. Sec. 841(a)(1). "Constructive possession exists when a person knowingly has the power and intention at a given time to exercise dominion and control over an object not in his or her actual possession." *United States v. Reed,* 141 F.3d 644, 651 (6th Cir. 1998)(quotation omitted). "Proof that the person has dominion over the premises where the [item] is

located is sufficient to establish constructive possession." *United States v. Kincaide,* 145 F.3d 771, 782 (6th Cir. 1998)(quotation omitted).

Simpson's conviction for possession of cocaine with intent to distribute is supported by the eleven individually wrapped crack rocks which were discovered in the console of a car during execution of a search warrant at Simpson's residence. Simpson's wallet was found in the locked glove compartment of that car, and Simpsonwas the only person at the residence at the time the search warrant was executed. Although the government did not prove Simpson's ownership of the car or that other persons did not reside with Simpson, there was sufficient circumstantial evidence to find that Simpson had constructive possession over the crack. Moreover, Claude Carter, a co-conspirator, identified Simpson as a crack dealer.

Anderson argues that because he was found to have a 1.5 gram rock of cocaine on only one occasion, there was insufficient evidence to support his conviction for possession with intent to distribute cocaine. However, one of the officers testifying at trial stated that the amount recovered from Anderson was consistent with distribution, and Erick Williams, Carter, and Roderick Moon identified him as a drug dealer.

Savage argues that the evidence presented at trial was not sufficient to convict him for possession with intent to distribute cocaine because the government did not present any direct evidence of Savage's physical possession of cocaine. He claims that Carter's testimony about Savage's handling of cocaine was not credible. However, Savage was not convicted of possessing cocaine with the intent to distribute, because he was convicted of CCE.

Coleman argues that because the government did not produce a lab report indicating the presence of crack in connection with the cocaine seized from his possession, the evidence was insufficient to convict him of possession with intent to distribute crack cocaine as charged in the indictment.[1] While it is true that not all cocaine is crack cocaine, the officer who recovered the cocaine from Coleman's possession testified that the cocaine was in a rock form and that he thought the cocaine was crack based on his prior experience with crack cocaine as a police officer. In addition, Lt. Kroger testified that Coleman admitted that he had been dealing crack.

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[1] The governement argues that Coleman has waived this issue because his Rule 29 motion did not identify this particular ground. Coleman's motion did not specify particular grounds, but specifcity of grounds is not required by a Rule 29 motion. See *United States v. Dandy*, 998 F.2d 1344, 1356 (6th Cir. 1993)(holding that while spcificity of grounds is not required for a motion under Rule 29, if particular grounds are identified, the defendant waived other possible grounds.)

Because crack may be identified with circumstantial evidence, *see United States v. Wright,* 16 F.3d 1429, 1439 (6th Cir. 1994), and the testimony of the police officers supports the cocaine's identification as crack, Coleman's conviction may not be overturned for insufficiency of evidence.[2]

Simpson and Anderson challenge the sufficiency of the evidence supporting their convictions for conspiracy to distribute cocaine primarily on the basis that all the government's evidence on this point came from the incredible testimony of unreliable witnesses. However, this court does not assess the credibility of the witnesses when reviewing a case for sufficiency of the evidence. There was more than ample evidence from Carter, Williams and Moon that such a conspiracy existed and that the defendants were willing participants in it. As Savage's conspiracy conviction will be set aside, to which the government agrees, due to our upholding his CCE conviction, *see United States v. Rutledge,* 517 U.S. 292, 305-07 (1996), we need not consider the sufficiency of the evidence against him.

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[2] "So long as the government produces sufficient evidence, direct or circumstantial, from which the jury is able to identify the substance beyond a reasonable doubt, the lack of scientific evidence is not objectionable." *Wright,* 16 F.3d at 1440.

The government provided sufficient evidence to support the defendants' convictions for conspiracy to distribute cocaine and for possession with intent to distribute cocaine.

C. SUFFICIENCY OF THE EVIDENCE ON FIREARMS CHARGES AGAINST SIMPSON

Simpson does not dispute that he was a felon, but he challenges the sufficiency of the evidence supporting a finding that he was in possession of a firearm in violation of 18 U.S.C. § 922(g). The .410 shotgun found during the execution of the search warrant at Simpson's residence was discovered in a bedroom bearing evidence of a male occupant. Simpson does not claim that the residence searched was not his, but he does argue that the government did not prove that no other persons lived at the residence. Although the police sergeant testifying about the search did not remember the contents of the second bedroom in the house, he stated that there was no indication of others staying there.

The government provided sufficient evidence to support Simpson's conviction for being a felon in possession of a firearm.

D. SIMPSON'S SENTENCE

Simpson argues that the district court erred in enhancing his sentence for obstruction of justice under USSG § 3C1.1. He claims

error because the same testimony supporting the enhancement, the testimony of Carter as to threats from Simpson, was also available at a bond hearing at which the district court declined to revoke Simpson's bond. The district court's findings of fact supporting a guidelines enhancement are reversible only if clearly erroneous. *See* 18 U.S.C.§ 3742(e).

During the trial, Carter testified about the threats from Simpson regarding Carter's decision to testify for the government. After his indictment, Carter absconded, but he was later apprehended and had his bond revoked. At a hearing on the government's motion to revoke Simpson's bond, the court declined to revoke the bond, stating that Simpson had not violated any condition of his bond and that the "only change ... is that Mr. Carter has testified as to his apprehension of harm. He is however now in custody and is therefore presumably beyond the reach of these defendants [Simpson and Savage]." The reasoning behind the court's decision not to revoke bond is not inconsistent with its decision to enhance Simpson's sentence for obstruction of justice on the basis of Simpson's threats to Carter. The district court did not err in finding that Simpson threatened Carter and that the threats constituted an obstruction of justice.

Simpson also argues that that his offense level should not have been enhanced for possession of a firearm in connection with a drug offense under USSG § 2D1.1(b)(1). He claims not only that the government did not prove his possession of either the drugs or the gun, but also that double jeopardy protections preclude an enhancement to his sentence for firearms possession when he was convicted of being a felon in possession of that firearm. The enhancement under § 2D1.1(b)(1) is to be applied "if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." USSG § 2D1.1, comment (n.3). The shotgun was found in Simpson's residence while he was there, and drugs were found in the console of the car in the driveway during the same search that uncovered the gun. Taken together, this evidence does not make it clearly improbable that the shotgun found in Simpson's residence was not connected to the conspiracy to distribute cocaine, as the connection between the gun and the drugs does not have to be great. *See, e.g., United States v. Chalkias,* 971 F.2d 1206, 1217 (6th Cir. 1992)(upholding a gun enhancement where an unloaded gun was found in the basement rafters of a house where drugs were stored, even though no ammunition was found).

Simpson's argument on double jeopardy grounds must also fail. If he had been convicted of using or carrying a gun during a drug offense under 18 U.S.C. § 924(c), an enhancement of his sentence for the drug offense would have been improper because a § 924(c) sentence is consecutive to other sentences. Simpson, however, was convicted under 18 U.S.C. § 922(g), and his sentence for that offense runs concurrently with his sentences for the drug offenses. The grouping of his offenses for sentencing purposes eliminated the possibility of a double jeopardy or double counting problem. After the offenses were grouped, the offense with the highest offense level was conspiracy to distribute cocaine, for which he was assigned an offense level of 38. The possession of the gun led to a two-level enhancement, as did the finding of obstruction of justice. With a total offense level of 42 and a criminal history of II, the sentencing table provides a sentence of 360 months to life. Through this system of grouping, Simpson's firearms *conviction* was essentially disregarded in arriving at the offense level.

Guideline § 5G1.2 governs sentencing on multiple counts of conviction, and provides that in a case such as Simpson's where one of the counts allows for a sentence encompassing the entirety of the recommended sentence (here, the conspiracy count allows a sentence

of 360 months to life, *see* 21 U.S.C. § 841(b)(1)(A)), the sentences on all counts will run concurrently. His conviction for possession with intent to distribute cocaine allows a maximum sentence of 20 years, *see* 21 U.S.C. § 841(b)(1)(C), and the firearms possession count calls for a maximum of 10 years, *see* 18 U.S.C. § 922(g). Simpson was sentenced concurrently to 360 months on the conspiracy count, 240 months on the possession with intent count, and 120 months on the firearms count. Because the counts were grouped and because his sentences run concurrently, the enhancement to Simpson's offense level for firearms possession does not impermissibly place him in double jeopardy.

The district court did not err in enhancing Simpson's sentence for obstruction of justice and for possession of the gun.

E. REFUSAL TO ADMIT MOON'S VIDEOTAPE

Anderson argues that a videotape recording an incident in October 1996 between Roderick Moon and two young women just before Moon shot the women was improperly excluded from evidence because it is relevant to show: 1) that the incident was more than an "altercation" as stated by Moon at trial; and 2) that not all violence involves drugs, a rebuttal to the government's argument that drugs equal violence. Anderson cites both Rules 404(b) and 608(b)

of the Federal Rules of Evidence to support his argument.

The district court's evidentiary ruling will only be reversed on "a clear showing of abuse of discretion." *United States v. Phillips,* 888 F.2d 38, 40 (6th Cir. 1989). Rule 608(b) states that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime ...may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness..." FED.R.EVID. 608(b). "Rule 608(b) prohibits ... extrinsic evidence regarding credibility and ... defense counsel are 'stuck with' the response given on cross-examination." *United States v. Frost,* 914 F.2d 756, 767 (6th Cir. 1990).

Moon testified that he had been convicted of first degree murder based on the incident in October 1996, although cross-examination on the issue was limited due to Moon's assertion of the privilege against self-incrimination. The district court excluded the videotape from evidence because it showed merely a prior bad act of a bad person, but it did allow Joy Anderson to testify about the incident. The court noted that the tape did not itself indicate any reason for Moon to be biased against his co-defendants and had no "perti-

nent value." Here, the defense was not merely stuck with the response of Moon on cross-examination, but was also allowed to present testimony from Joy Anderson as to the extent of the altercation which occurred before the shooting.

Rule 608(b) disallows the use of the tape to attack Moon's credibility, seemingly the issue in Anderson's argument about the extent of the altercation, but the rule does not disallow its use to show bias. The tape, however, does not demonstrate prejudice or bias. Moon's potential bias against codefendants was indicated through the testimony of codefendant Savage and Joy Anderson, who both testified against Moon at his previous murder trial. Anderson also tries to use Rule 404(b) to show the tape's admissibility, but the issues he wishes to have corroborated, or rather contradicted, are not "significant." The district court did not err in excluding the videotape from evidence.

F. GOVERNMENT MISCONDUCT IN VIOLATION OF 18 U.S.C. § 201(c)(2)

In supplemental pro se briefs, Anderson and Savage claim that the district court committed plain error when it allowed their due process rights to be violated by allowing the presentation of testimony bought by the government in violation of 18 U.S.C. § 201(c)(2).

Under *United States v. Ware,* 161 F.3d 414, 418-25 (6th Cir. 1998), *cert. denied* 119 S.Ct. 1348 (1999), their appeals on this point fail.

G. SUFFICIENCY OF THE EVIDENCE FOR CCE

Savage argues that the evidence presented at trial was not sufficient to convict him under 21 U.S.C. § 848 for a continuing criminal enterprise ("CCE") because Carter's testimony was not credible as to the number of participants. Carter's testimony was sufficient to establish that Savage organized or supervised at least five persons involved in the drug operation as required for a CCE conviction. He outlined supervisory or organizational contacts by Savage with himself, Anderson, Simpson, Munroe, and Williams.

H. SEARCH OF RESIDENCE

Savage further argues that the district court should have suppressed the evidence seized because the affidavit for the search warrant allowing the search of 8129 North Vassar Road with attached garage and unattached pole barn was insufficient as it did not provide probable cause to search at that address. In reviewing suppression issues, this court uses a clear error standard for the district court's factual findings, while it reviews the legal conclusions *de novo. See United States v. Hill,* 142 F.3d 305, 310 (6th Cir.), *cert. denied,* 119 S.Ct. 225 (1999). "A probable cause determination by a judicial

officer issuing a search warrant must be upheld if, under the totality of the circumstances, the issuing officer had a 'substantial basis' for finding probable cause. Probable cause requires 'only a probability or substantial chance of criminal activity.' " *Id.* (quoting *Illinois v. Gates,* 462 U.S. 213, 238, 243-45 n. 13 (1983)).

Under the totality of the circumstances, the magistrate issuing the warrant had a substantial basis for finding probable cause, as the affidavit as a whole indicates a probability that evidence relating to criminal activity would be found at 8129 North Vassar Road. The district court properly denied the motion to suppress the evidence recovered at Savage's residence.

I. ERROR IN SENTENCING FOR CRACK RATHER THAN COCAINE

Coleman asserts that the government did not prove that the cocaine was crack rather than simply cocaine as it is required to do before he may be sentenced on the higher guideline levels established for crack. Although he objected to the amount of drugs attributed to him at sentencing, no objection to the identity of the drugs as crack was raised. Under *United States v. Cullens,* 67 F.3d 123, 124 (6th Cir. 1995), the issue has been waived.

J. GROUPING CONVICTIONS FOR CONSPIRACY AND FOR POSSESSION WITH INTENT TO DISTRIBUTE

Coleman also argues that the district court erroneously failed to group his convictions for conspiracy to distribute cocaine and possession with intent to distribute crack cocaine under USSG § 3D1.2. He claims that after grouping, he should have received one sentence under USSG § 3D1.5 instead of the two sentences he received.

Under Sec. 3D1.2, closely related offenses are grouped together for the purpose of arriving at a single offense level. Both of these offenses were drug offenses, so they were grouped and the aggregate amount of crack involved was used to assign an offense level of 38 under §§ 2D1.1(a)(3) and 2D1.1(c)(1) because more than 1.5 kilograms of crack was involved. There were no adjustments to the offense level. An offense level of 38 carries a sentencing range of 324-405 months when the criminal history level is IV, as is Coleman's. Sentences on each count of conviction are then assessed based on § 5G1.2. That guideline section states that when, as here, the "sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts shall run concurrently . . . ." USSG § 5G1.2(c). Coleman's conspiracy conviction has a statutory sentencing range of

10 years to life, and the possession with intent to distribute cocaine count has a maximum sentence of 20 years imprisonment. The district court sentenced Coleman to concurrent sentences of 324 months on the conspiracy conviction and 240 months on the possession with intent to distribute conviction.

Coleman next argues that even if he was appropriately given two sentences, the district court erred in calculating the amount of drugs to be attributed to him in connection with the possession with intent to distribute count. As outlined above, the district court properly sentenced Coleman on the possession with intent to distribute count using the combined offense level of 38. Coleman argues that the system therefore impermissibly double-counts the drugs because the sentence for each count is based on the entire drug amount. The court in *United States v. Davern*, 970 F.2d 1490, 1494 (6th Cir. 1992), held that "a base offense level is determined by the amount of drugs included in the defendant's relevant conduct, not just amounts in the offense of conviction or charged in the indictment."

Although *Davern* did not directly address the issue of double-counting, a similar argument in terms of a double jeopardy challenge was addressed in *Witte v. United States*, 515 U.S. 389, 397 (1995). There the Court held that for double jeopardy purposes, a defendant is

punished only for the offense of which he is convicted, even if uncharged conduct is considered in arriving at a sentence, and that the defendant may later be separately convicted and punished for the previously uncharged conduct. The Court also determined that the sentencing guidelines were designed to avoid the potential unfairness of seemingly duplicative sentences through the use of concurrent sentences and the ability of a court to impose a sentence below the guideline range should it find mitigating circumstances not taken into account by the guidelines. *Id.* at 404.

The district court did not err in sentencing Coleman.

K. CLAIM UNDER *OVALLE*

Coleman's final challenge to his conviction is based on *United States v. Ovalle*, 136 F.3d 1092 (6th Cir. 1998). He argues that while he may be foreclosed from challenging the makeup of the grand jury because he did not raise the issue below, he is not foreclosed from challenging the selection of the petit jury because such a challenge is not based on a defect in the indictment. He then argues that even if his claim has been waived due to his failure to raise the issue below, this court should grant relief from the waiver for cause shown- he finds the requisite cause in both the fact that he did not know the jury selection process to be discriminatory until *Ovalle* was decided

after his sentencing and in his claim that a defendant is always prejudiced by a discriminatory jury selection process.

Under *Ovalle,* however, a challenge to a petit jury is treated the same as a challenge to a grand jury, which means the challenge is waived unless raised prior to trial. *Id.* at 1107. Relief from that waiver is only granted when the defendant has shown cause and actual prejudice. *Id.* Coleman has not shown actual prejudice, and the fact that *Ovalle* was not decided until after Coleman's trial is not sufficient cause for this court to grant relief from the waiver of the issue.

The judgment of the district court is AFFIRMED, and Savage's conviction for conspiracy is set aside.